IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDWARD S. MACHULSKI, individually and in his capacity as Executor of the Estate of Stanley F. Machulski, Sr., and STANLEY F. MACHULSKI, JR.,	)	C.A. No. 06C-06-0310 (JTV)
Plaintiffs,	)	
v.	)	
MARY C. BOUDART, ESQUIRE and DOROSHOW, PASQUALE, KRAWITZ & BHAYA,	)	
Defendants.	)	

Submitted: October 30,2006
Decided: January 31, 2007

Kevin W. Gibson, Esq., Gibson & Perkins, Media, Pennsylvania. Attorney for Plaintiffs.

Jeffrey M. Weiner, Esq., Wilmington, Delaware. Attorney for Defendants.

Upon Consideration of Defendants' Motion to Dismiss
DENIED

VAUGHN, President Judge

Machulski et al. v. Boudart, et al.
C.A. No. 06C-06-310
January 31, 2007

OPINION

The defendants, Mary C. Boudart, Esquire and Doroshow, Pasquale, Krawitz & Bhaya, have filed a motion to dismiss this case pursuant to Superior Court Rule 12(b)(6). That rule provides that a case may be dismissed if the plaintiff fails to state a claim upon which relief can be granted. Defendants have filed an affidavit in addition to their motion and, therefore, the motion must be considered a motion for summary judgment.[1] The plaintiffs oppose the motion. The case involves a claim of alleged legal malpractice.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] The facts must be viewed in the light most favorable to the nonmoving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question

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[1] *Shultz v. Delaware Trust Co.,* 1976 Del. Super. LEXIS 102.

[2] Super. Ct. Civ. R. 56(c).

[3] *Guy v. Judicial Nomination Comm'n,* 649 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.,* 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

[4] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

becomes one for a decision as a matter of law.[5] When a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[6]

FACTS

The plaintiffs, Edward Machulski and Stanley Machulski, Jr., allege that they and their father, Stanley F. Machulski, Sr., hired Ms. Boudart, an attorney, to draft documents to ensure that the non-marital assets of their father would not go to their stepmother, Philomena Machulski, upon his passing. Ms. Boudart prepared reciprocal wills for Mr. and Mrs. Machulski, Sr., with Mrs. Machulski's draft containing a waiver of her elective share of her husband's estate. Ms. Boudart met with plaintiffs' father on June 27, 2003 at his residence at which time he signed his Will and a Power of Attorney. Mrs. Machulski was apparently there but would not interact with Ms. Boudart and refused to sign her will. Ms. Boudart left the wife's will at the house. There was apparently no follow-up as to the wife's will thereafter. The plaintiffs' father passed away two months later, on August 27, 2003. On December 29, 2003 Mrs. Machulski filed for an elective share.[7] The plaintiffs have settled Mrs. Machulski's claim for over $100,000, including a portion of the money from the sale of a house which their father owned prior to the marriage and which was

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[5] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

[6] *Moore v. Sizemore,* 405 A.2d 679 (Del. 1979).

[7] She had previously filed a claim for a spousal allowance on September 29, 2003.

in his name alone.

As mentioned above, when considering a motion for summary judgment, the court must consider the facts in the light most favorable to the plaintiffs. Viewing the facts from this perspective, without expressing any opinion about the facts, it appears that the plaintiffs' allege that Ms. Boudart did not adequately explain to them the effect of Mrs. Machulski's refusal to sign her will. Specifically, it appears that they allege that Ms. Boudart made statements to them at the time or failed to make statements to them which left them with the impression that the father's execution of his own will leaving them the house was sufficient to pass the house to them free and clear of claims from the wife, even though the wife refused sign her will. They also allege that, upon Mrs. Machulski's refusal to sign her will, Ms. Boudart should have advised them of other steps which could have been taken to avoid or minimize the wife's elective share. In particular, they allege that Ms. Boudart should have advised them to recommend to the father that he convey the house to them during his lifetime to remove it from the elective share estate.[8]

PARTIES' CONTENTIONS

The defendants contend that the last day of services rendered by Ms. Boudart was June 27, 2003. They contend that any alleged negligence on her part must have occurred on or before that date. They contend that under 10 *Del. C.* § 8106, the

[8] At oral argument on the motion, there was some discussion as to whether the house would have been drawn back into the elective estate even if it had been conveyed by the father to the children prior to the father's death, thus mooting the plaintiffs' allegations. Preliminarily it appears that it may not have been drawn back into the estate. I make no finding on that point at this time.

defendants had a maximum of three years from the accruing of the cause of action to file their claim. Suit was filed on June 29, 2006. Defendants contend that plaintiffs filed after the expiration of the three year limitation period, specifically two days late. For this reason, they contend, the case is time barred and should be dismissed.

The plaintiffs contend that the time period was tolled by the time of discovery rule. They contend that there were no observable or objective factors that would have put plaintiffs on notice of any negligence until Mrs. Muchulski filed for her spousal allowance on September 29, 2003 . Plaintiffs contend that because they filed within three years of that date, their complaint was filed timely.

DISCUSSION

"It is settled law of this State that legal malpractice actions are governed by the three-year statute of limitations in 10 *Del. C.* § 8106."[9] "Generally, ignorance of the facts constituting a cause of action does not act as an obstacle to the operation of the statute, except in the case of infancy, incapacity, and certain types of fraud."[10] However, a narrow exception can occur which will toll the statute from running until the day the injury is discovered by the injured. "The time of discovery rule is applicable to those cases 'involving services and particular professions which resulted in injuries which were inherently unknowable' and for which 'the injured party was

[9] *Began v. Dixon*, 547 A.2d 620, 623 (Del. Super. Ct. 1988).

[10] *Id. citing Mastellone v. Argo Oil Corp.*, 82 A.2d 379 at 383 (Del. Super. Ct. 1952).

blamelessly ignorant.'"[11]

In substance, the plaintiffs allege that their discussion with Ms. Boudart left them with an impression that their goal had been accomplished by their father's execution of his will, notwithstanding Mrs. Machulski's refusal to sign hers. It appears that a factual dispute exists concerning this point, and that I cannot, therefore, conclude as a matter of law that the problem was not inherently unknowable to the plaintiffs until later, such as when Mrs. Machulski asserted her first claim. For this reason, the motion to dismiss on the ground that the action is time-barred must be denied at this time, without prejudice.

The remaining contentions of defendants in support of their motion that the plaintiffs have failed to state a claim upon which relief can be granted are unpersuasive.

Therefore, the defendants' motion for summary judgment is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[11] *Shuttlework v. Lynch,* 1995 Del. Super. LEXIS 236 *citing Pioneer Nat'l Title Ins. Co. v. Sabo*, 382 A.2d 265 (Del. Super. Ct. 1978).